Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

DAVID E. DANNER, ESQ.,
Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE TENNESSEE SUPREME COURT,
CHARLES A. HIGH,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 19, 2009

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QUESTION PRESENTED

I.

Whether *Younger* abstention applies to bar a constitutional challenge to a state law in federal court due to concurrent but separate and unrelated state proceedings against the federal litigant.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 2009 WL 1391981 (6th Cir. May 18, 2009). The opinion of the United States District Court for the Middle District of Tennessee is reported at 2008 WL 3200799 (M.D. Tenn. August 7, 2008).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the opinion of the United States District Court for the Middle District of Tennessee, was filed on May 18, 2009. A timely petition for rehearing was denied on July 29, 2009. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the

> State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws. ...

Tennessee Constitution, Article I – Declaration of Rights

Tennessee Constitution, Article I, Section 8

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Section 4.3, Rule 9 of the Tennessee Supreme Court

> On petition of the Disciplinary Counsel and supported by an affidavit demonstrating facts personally known to affiant, showing that an attorney has ... failed to respond to the Board or Disciplinary Counsel concerning a complaint of misconduct ..., the [Tennessee] Supreme Court may issue an order with such notice as the Court may prescribe imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both. ...

Tennessee Code Annotated 8-23-207

> [A]ny self-sustaining board, commission or agency created by the supreme court of Tennessee shall be deemed a state agency and all employees of such boards, commissions or agencies shall be deemed state employees and shall be entitled to the same rights and benefits enjoyed by other state employees. ...

Tennessee Code Annotated 8-23-204(a)(1)(C)

> 'State agency' means any department, commission, board, office or other agency of the executive, legislative or judicial branch of state government.

Tennessee Uniform Administrative Procedures Act, T.C.A. 4-5-101 et seq.

Tennessee Code Annotated 4-5-102(2)

> 'Agency' means each state board, commission, committee, department, officer, or any other unit of state government authorized or required by any statute or constitutional provision to make rules or to determine contested cases ...

Tennessee Code Annotated 4-5-320 - Proceedings affecting licenses. —

(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct that warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

(d) (1) Notwithstanding the provisions of subsection (c), in issuing an order of summary suspension of a license the agency shall use one (1) of the following procedures:

(A) The agency shall issue a notice to the licensee providing an opportunity for a prompt informal hearing, review or conference before the agency prior to the issuance of an order of summary suspension; or

(B) The agency shall proceed with the summary suspension and notify the licensee of the opportunity for an informal hearing, review or conference before the agency within seven (7) business days of the issuance of the order of summary suspension.

(2) The notice provided to the licensee may be provided by any reasonable means and shall inform the licensee of the reasons for the action or intended action of the agency and of the opportunity for an informal hearing, review or conference before the agency. The informal hearing, review or conference described by this subsection (d) shall not be required to be held under the contested case provisions of this chapter. The hearing, review or conference is intended to provide an informal, reasonable opportunity for the licensee to present the licensee's version of the situation to the person or entity authorized by law to summarily suspend the license involved. Whether the informal hearing, review or conference is held before or after an order of summary suspension, the sole issue to be considered is whether the public health, safety or welfare imperatively required emergency action by the agency.

STATEMENT OF THE CASE

This appeal seeks to challenge the constitutionality of one or more provisions of the regulatory rules of the Tennessee Supreme Court that permit such judicial entity via its administrative agencies and lower courts to summarily take the property right of Tennessee lawyers, that is, a law license, without the due process of law required by the U.S. Constitution which state administrative rules where used herein as tools to

engage in targeted harassment and retaliation towards petitioner Tennessee lawyer for said counsel's series of advocacy to improve the administration of justice in the state of Tennessee.

Petitioner engaged in the First Amendment protected activity of pursuing prior constitutional litigation commenced on April 24, 2006 against respondent state board, *Danner v. Board of Professional Responsibility of the Tennessee Supreme Court* (**Danner I**), 277 Fed. Appx. 575, 2008 WL 1987043 (6th Cir. May 6, 2008),[1] which challenged the

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[1] Petitioner also published a full-length commentary on the editorial page of Nashville, Tennessee newspaper *The City Paper* on March 26, 2008 which was critical of the Tennessee Supreme Court and the Tennessee Plan (T.C.A. 17-4-101 et seq.) stating that the system of selection and appointment of state appellate judges offended the Tennessee Constitution, to wit:

> The Judges of the Supreme Court *shall be elected by the qualified voters of the State*. The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article. Every Judge of the Supreme Court shall be thirty-five years of age, and shall before his election have been a resident of the State for five years. His term of service shall be eight years.
>
> The Judges of the Circuit and Chancery Courts, and of other inferior Courts, *shall be elected by the qualified voters of the district or circuit to which they are to be assigned*. Every Judge of such Courts shall be thirty years of age, and shall before his election, have been a resident of the State for five years and of the circuit or district one year. His term of service shall be eight years.

TENN. CONST., Art. VI, Sec. 3, Sec. 4 (emphases added). Petitioner urged the Tennessee General Assembly to end the

constitutionality of *Section 8.1* of Rule 9 of the Tennessee Supreme Court. Thereafter, Respondents threatened Petitioner lawyer with disbarment or suspension on the charge that Petitioner failed to respond to informal ethics inquiries by Respondents, who have the apparent regulatory authority to write letters to Tennessee lawyers seeking informal responses to client complaints on various issues arising within the attorney-client relationship. Petitioner responded by letter dated August 6, 2007 to Respondents' ethics inquiry dated July 25, 2007. Despite such response by Petitioner, Respondents submitted to Petitioner a *Notice of Petition for Temporary Suspension* dated September 4, 2007 pursuant to *Section 4.3* of Rule 9 of the Tennessee Supreme Court for failure to respond to said letter dated July 25, 2007. Such accusation of non-response was the second time in as many months that Petitioner was wrongfully accused by Respondents of non-response to an informal ethics inquiry.

Tennessee Plan, which was due to sunset in June 2008 if not renewed by such state legislature. The Chief Justice of the Tennessee Supreme Court published a rebuttal opinion to Petitioner's commentary in the July 7, 2008 edition of *The City Paper*. Petitioner engaged in other public commentary against the Tennessee Plan on both Nashville and Knoxville, Tennessee talk radio stations on May 19, 2008. Petitioner urged the public to contact their state legislators to vote to end the Tennessee Plan. The Tennessee Plan was dealt an adverse procedural vote within the Tennessee General Assembly on May 20, 2008 which vote caused a key institution that selected Tennessee state judges - the now-defunct Tennessee Judicial Selection Commission - to begin a one-year wind-down to extinction that culminated in June 2009. *Tennessee Bar Fight: Busting the monopoly on judicial selection*, WALL ST. J., June 15, 2009, at A14.

Petitioner filed a Complaint in the U.S. District Court for the Middle District of Tennessee against Respondents on June 27, 2008 seeking prospective, equitable relief challenging the constitutionality of *Section 4.3* (**Danner II**), whereas the prior suit had challenged *Section 8.1* (**Danner I**). The District Court possessed subject matter jurisdiction over the federal constitutional claims therein pursuant to 28 U.S.C. §§ 1331 and 1343 and supplemental jurisdiction over the corresponding state constitutional claims therein pursuant to 28 U.S.C. 1367.[2] Respondents filed an Answer in District Court on July 21, 2008. On the same day July 21, Respondents also commenced a formal ethics proceeding against Petitioner in a state tribunal. Respondents' Answer in federal court pled abstention as a defense due to such state proceedings. On the next day July 22, Petitioner filed a motion for restraining order with the District Court seeking to enjoin Respondents from any effort to summarily suspend Petitioner's law license pursuant to *Section 4.3*. The motion was set for a July 31, 2008 hearing, wherein the District Court declined to take any evidence from Petitioner and ruled to dismiss the Petitioner's case *sua sponte* by order dated August 7, 2008 based on the abstention doctrine due to said state ethics action filed against Petitioner by Respondents on July 21, 2008 subsequent to Petitioner's federal action filed on June 27, 2008. Petitioner filed a timely notice of appeal on September 5, 2008.

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[2] Pursuant to 28 U.S.C. 1367, respondent state agency can be sued in federal court for supplemental state claims because, *inter alia*, a state agency is a "person", pursuant to T.C.A. 4-5-102(9), for the purpose of Petitioner's state claims under the Tennessee Constitution, as opposed to 42 U.S.C. 1983 "person" analysis concerning such government entities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit adopted, via summary disposition, the opinion of the U.S. District Court for the Middle District of Tennessee on May 18, 2009. Petitioner filed a timely motion for rehearing on May 26, 2009 requesting that the Sixth Circuit independently review the substantive issues in Petitioner's appeal. The Sixth Circuit denied Petitioner's request for rehearing on July 29, 2009.

This Petition seeks a fair opportunity to advocate that the decisions of the United States Supreme Court concerning abstention be amplified and clarified via a modern holding that such decisions do not authorize the abstention doctrines being abused by state governments to block litigation in federal court based on frivolous and false charges filed against a federal litigant in a state tribunal after the commencement of such litigant's federal action.

ARGUMENT

A. Reasons for granting Petition

Because Petitioner filed a federal constitutional claim in federal district court on June 27, 2008 and Respondents subsequently filed both an answer with the federal court and a state charge against Petitioner with a state ethics panel on the same day July 21, 2008 wherein said answer in federal court claimed abstention as a defense due to said separate and unrelated state proceedings, *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed.2d 669 (1971), the Tennessee Supreme Court possesses the demonstrated and deliberate option to deflect much needed constitutional reform within the state judiciary by falsely charging a vocal and vigilant Tennessee lawyer

with ethics violations arising from facially frivolous attorney-client complaints, thereby conjuring ongoing state proceedings, in order to cause any such constitutional claim in federal court to be dismissed; whereas, this Court has opened the door to preventing such abstention abuse via its preliminary standard that a state proceeding that is contemporaneous to a federal proceeding must not result in the federal court applying *Younger* abstention to dismiss the federal action if the state-court action does not present a substantial and immediate possibility of obviating the federal claim because of any resultant state-court decision on state-law grounds. Steffel v. Thompson, 415 U.S. 452, 475, ftnt. 22, 94 S. Ct. 1209, 1224, ftnt. 22, 39 L.Ed.2d 505, 524, ftnt. 22 (1974) citing Lake Carriers Ass'n v. MacMullen, 406 U.S. 498, 92 S. Ct. 1749, 32 L.Ed.2d 257 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L.Ed.2d 515 (1971). Petitioner was falsely accused multiple times in 2007 of the state ethics violation of failing to respond to the ethics inquiries of Respondents which inquiries were both harassing and repetitive and also submitted to Petitioner subsequent to Petitioner's protected activities to reform the Tennessee judiciary. Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963) (holding that harassing governmental ethics investigations may constitute constitutional violations). In the *Jordan* case, black lawyers protested the excessive, harassing investigative practices of a state entity that ostensibly concerned itself with "legal ethics" but that misused such respectable mantra to conceal and camouflage civil rights violations. 323 F.2d at 602-603, 604, 606. The *Jordan* court saw fit to retain jurisdiction amidst that state's efforts to engage in abstention abuse in order for the plaintiff lawyers therein to be fairly heard in

federal court on the merits, 323 F.2d at 605-06, whereas the District Court herein denied Petitioner lawyer any opportunity to be heard on the merits despite Petitioner claiming comparable abuse and citing *Jordan* (2008 WL 3200799). Cf Id.

Petitioner sought prospective, general equitable relief in federal district court challenging the constitutionality of lawyer disciplinary rule *Section 4.3* of Rule 9 of the Tennessee Supreme Court, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485-487, 103 S. Ct. 1303, 1316-1317, 75 L.Ed.2d 206, 224-25 (1983), *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L.Ed. 362 (1923),[3] wherein the

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[3] An exception to the *Rooker-Feldman* abstention doctrine - which doctrine prohibits state litigants from appealing final state-court rulings to federal district courts - permits American lawyers to challenge the constitutionality of state bar rules in federal district court seeking prospective, general equitable relief because such exception makes an apparent distinction between state-court rulings and state-court rules in applying fundamental abstention principles that bar a federal court from proscribing or reviewing state-court rulings. See Feldman, 460 U.S. at 485-487, 103 S. Ct. at 1316-1317, 75 L.Ed.2d at 224-25 (1983). Such *Rooker-Feldman* abstention exception corresponds to the well-established Eleventh Amendment exemption that permits federal litigants to challenge the constitutionality of such state rules seeking prospective, general equitable relief. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed.714 (1908); but compare Dubuc v. Michigan Bd. of Law Examiners, 342 F.3d 610, 615 (6th Cir. 2003) (analyzing Eleventh Amendment concerning Michigan bar *with* multi-tiered, state-treasury Sixth Circuit standard, *by a circuit panel*) *citing Brotherton v. Cleveland*, 173 F.3d 552, 560-61 (6th Cir. 1999) with Lawrence v. Chabot, 182 Fed. Appx. 442, 450 (6th Cir. 2006)(analyzing Eleventh Amendment concerning same Michigan bar *without* multi-tiered, state-treasury Sixth Circuit standard, *by a separate circuit panel*)

above-stated concurrent and contrived state proceedings against Petitioner had no relationship to Petitioner's *Section 4.3* challenge in federal court because there was no *Section 4.3* claim within such state proceedings commenced on July 21, 2008 with the state ethics panel and brought subsequent to Petitioner being falsely accused in 2007 of *Section 4.3* violations, which *Section 4.3* threats of law licensure suspension nevertheless provided Petitioner *jus tertii* standing to sue in federal court challenging *Section 4.3*. Steffel, 415 U.S. at 475-476, 94 S. Ct. at 1223-1224, 39 L.Ed.2d at 524 (holding that, regardless of whether federal injunctive relief may be appropriate, federal declaratory relief is not precluded when no state proceeding is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state rule).[4]

The *Steffel* standard concerning concurrent but separate and unrelated state proceedings - which incrementally and effectively modified the prior *Younger* holding on said narrow grounds - must be elevated from a slight fine-print footnote to a settled definitive doctrine. Steffel, 415 U.S. at 475 ftnt. 22, 94

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[4] Because most Tennessee lawyers, despite their advanced legal training, are fearful of rightfully challenging the Tennessee Supreme Court agencies that have jurisdiction over their law licensure – the Board of Professional Responsibility and the Commission on Continuing Legal Education and Specialization - concerning unconstitutional administrative rules, petitioner possesses *jus tertii* standing to represent both his interests and the interests of all Tennessee lawyers herein. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988); Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 104 S. Ct. 2839, 81 L.Ed.2d 786 (1984); Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976).

S. Ct. at 1224 ftnt. 22, 39 L.Ed.2d at 524 ftnt. 22.[5] The *Steffel* court "left open" the issue of whether a state proceeding must be pending on the day the federal case is filed, *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S. Ct. 2281, 2292, 45 L.Ed.2d 223, 239 (1975), which the *Hicks* court answered in the negative by holding that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force" concerning an action wherein such plaintiffs therein were actually charged with violating a statute that these federal litigants were actually challenging in federal court. Id. However, the *Hicks* court in turn "left open" intertwining issues created by such subterranean standard within *Steffel* such as (1) whether *Younger* should apply to bar a prospective constitutional challenge to a state law in federal court due to state proceedings that have no direct relationship to the specific law being challenged in federal court, (2) whether *Younger* should apply in a case wherein frivolous state proceedings are commenced against a federal plaintiff after such litigant files a civil rights action in federal court, and (3) whether *Younger* should apply in a case wherein a federal plaintiff has

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[5] This Court has discussed and decided an abstention anomaly concerning concurrent and interrelated federal and state proceedings arising from the same federal law. Colorado River Water Conservation District, et al. v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976). But no abstention standard exists for concurrent and unrelated federal and state proceedings arising from different state rules or laws. 424 U.S. 800, 813-19, 96 S. Ct. 1236, 1244-47, 47 L.Ed.2d 483, 495-99.

committed no offense under the state law that such plaintiff is challenging in federal court. See Id. Because Petitioner lawyer did not violate state disciplinary rule *Section 4.3* without dispute, an extended quote of Seventh Circuit jurisprudence interpreting, amplifying, and clarifying *Younger* within these general contexts is appropriate, to wit:

> Abstention ... is a narrow exception to the duty of a federal court to adjudicate a controversy before it and is justified only in exceptional circumstances. *See County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 79 S. Ct. 1060, 1062-63, 3 L.Ed.2d 1163 (1959). ...
>
> Plaintiffs claim that the type of abstention in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971), is appropriate in this case. *Younger* abstention was recently applied to state bar disciplinary hearings in *Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S. Ct. 2515, 73 L.Ed.2d 116 (1981). It must be noted, however, that the proceeding in *Middlesex* followed an alleged violation of disciplinary rules. In fact, the Supreme Court has only applied *Younger* in cases where a state enforcement proceeding followed an alleged violation of a state statute or rule, even if only in civil proceedings. *See e.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200, 43 L.Ed.2d 482 (1975)(enforcement of nuisance statute after alleged violation); *Juidice v. Vail*, 430 U.S. 327, 97 S. Ct. 1211, 51 L.Ed.2d 376 (1977)(judicial contempt proceeding after alleged violation); *Trainor v. Hernandez*, 431 U.S. 434, 97 S. Ct. 1911, 52 L.Ed.2d 486

(1977)(civil suit seeking return of money fraudulently obtained).

The Seventh Circuit has explicitly required some sort of violation and the existence of subsequent enforcement proceedings for a *Younger* abstention to be allowed. In *People of the State of Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913, 103 S. Ct. 1891, 77 L.Ed.[2d] 282 (1983), the Seventh Circuit held that *Younger* does not require abstention where there has been no violation of state law. In that case the federal plaintiff brought a declaratory action alleging that a certain state law was unconstitutional. The federal defendant, the state, subsequently filed an action in state court seeking an injunction against the federal plaintiffs predicated upon the statute. The Seventh Circuit held that removal of the state action was improper. The court then refused to apply the *Younger* doctrine to the federal case.

> [T]he federal plaintiffs in the present case did not violate state law, so the state could not have brought a penalty action against them. The state's interest in maintaining law and order through enforcement of its penal statutes was not impaired by the federal lawsuit and the principle of the *Younger* case is therefore inapplicable.

Id. at 212. ...

The court in *General Electric* was specifically concerned with the situation that would occur

here if the court allowed an action for prospective relief to form the basis for a *Younger* abstention.

> [T]he state argues, as an alternative ground for dismissal of the federal suit, that the district court, even if it had jurisdiction, should have abstained from exercising it and forced the companies to litigate exclusively in the state courts. There must be something wrong with this argument, because if it were accepted it would prevent people from ever challenging the constitutionality of state legislation in federal court. Every time someone brought a suit to have a state law declared unconstitutional the state would immediately file an action in state court to enjoin violation of the statute and then move the federal district court to stay or dismiss the federal suit, thereby forcing the federal plaintiff to litigate his federal claims by way of defense in the state court action.

683 F.2d at 212-13. In the present case plaintiffs chose to litigate their constitutional claims in federal court. They had not, at the time of filing, violated the disciplinary rule ... In this circuit at least, the state cannot now bring an enforcement action that would require this court to abstain. ...

Adams v. Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, 600 F. Supp. 390, 394-95 (N.D. Ill. 1984) aff'd 801 F.2d 968 (7th Cir. 1986)(holding that *Younger* abstention is

inapplicable to dismiss a federal-court action by a lawyer challenging the constitutionality of a disciplinary rule of a state supreme court wherein the lawyer had not violated the challenged state rule wherefore the state could bring no proceeding in state court against such lawyer concerning the challenged rule). The Seventh Circuit standards stated in *Adams* and *General Electric* could be operative as guides to deliberate the Question herein, and also the above-stated three (3) interrelated and facilitating issues attached thereto, concerning the current tenor of *Younger* among the Circuits in the wake of its progeny, *Hicks v. Miranda*, 422 U.S. 332, 95 S. Ct. 2281, 45 L.Ed.2d 223 (1975), *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 39 L.Ed.2d 505, 524 (1974), *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed.2d 669 (1971), because this Court has established no definitive holding to govern or guide federal-court adjudication of concurrent but separate and unrelated state proceedings. See Colorado River Water Conservation District, et al. v. United States, 424 U.S. 800, 813-19, 96 S. Ct. 1236, 1244-47, 47 L.Ed.2d 483, 495-99 (1976)(discussing history of federal-state courts concurrent jurisdiction standards as issues independent from the abstention doctrines).

This Court must exercise its supervisory function over lower federal courts because (1) the Sixth Circuit departed far from accepted and usual judicial proceedings because Petitioner briefed *Steffel* on appeal but the Sixth Circuit in its terse rulings below (2009 WL 1391981) simply ignored such binding precedent set by this Court, *Steffel*, 415 U.S. at 475-476, 94 S. Ct. at 1223-1224, 39 L.Ed.2d at 524, (2) the District Court departed far from accepted and usual judicial proceedings, which departure was sanctioned

by the Sixth Circuit, by, without basis in law, summarily dismissing Petitioner's claim *sua sponte* at threshold stage during Petitioner's injunction hearing held on July 31, 2008 – without Respondents even having to file a customary F.R.C.P. 12 motion to dismiss citing any applicable law - thereby affirmatively denying Petitioner any opportunity to present any evidence to support Petitioner's retaliation claim or his motion for a temporary restraining order seeking equitable relief, *F.R.C.P. 65(b)*, *Steffel*, 415 U.S. at 475-476, 94 S. Ct. at 1223-1224, 39 L.Ed.2d at 524 (holding that federal equitable relief is not precluded when no state proceeding is pending), *Adams*, 600 F. Supp. at 392, 396 (granting temporary restraining order in federal court to lawyer concerning operation of a disciplinary rule promulgated by a state supreme court), and (3) the decision of the Sixth Circuit in the instant *Danner II* (2009 WL 139981) case directly conflicts with comparable decisions of the Seventh Circuit upholding the *Adams* court (801 F.2d 968) and interpreting the *Younger* court concerning the nuances of various abstention standards. Adams, 600 F. Supp. at 393-396 (discussing and distinguishing the *Burford*, *Pullman*, and *Younger* abstention standards of the United States Supreme Court as non-applicable to lawyers who have violated no ethics rule being challenged in federal court);[6] People of the State of Illinois v. General Electric Co., 683 F.2d 206 (7th Cir.

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[6] Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed.2d 669 (1971); Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L.Ed. 1424 (1943); Railroad Commission of Texas v. Pullman, 312 U.S. 496, 41 S. Ct. 643, 85 L.Ed. 971 (1941); see also Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S. Ct. 1070, 3 L.Ed.2d 1058 (1959).

1982) cert. denied 461 U.S. 913, 103 S. Ct. 1891, 77 L.Ed.2d 282 (1983)[*supra*].

Therefore, the time has come for further progression of the progeny of *Younger* abstention in order to resolve practical and pressing problems left pending by these cases and controversies concerning constitutional challenges to state laws in federal court amidst concurrent but separate and unrelated state proceedings against federal litigants. See Id.

B. Rules of the Tennessee Supreme Court offend the United States Constitution

Pursuant to *Section 4.3* of Rule 9 of the Tennessee Supreme Court, any Tennessee lawyer can be disbarred or suspended without a pre-deprivation hearing for an alleged failure to respond to an ethics inquiry; therefore, *Section 4.3* is unconstitutional because such summary suspension offends the procedural due process clause of the Fourteenth Amendment to the United States Constitution. See e.g. Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18, 33 (1976); Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972); Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970); Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L.Ed.2d 1230 (1961). In this type of case, procedural due process specifically requires an evidentiary hearing *before* summary suspension of law licensure is implemented pursuant to *Section 4.3*. Zinermon v. Burch, 494 U.S. 113, 136-39, 110 S. Ct. 975, 989-90, 108 L.Ed.2d 100, 120-22 (1990). First, it is not unforeseeable that a Tennessee lawyer could be suspended under said rule. Id. at 136. Second, it is not impossible for Respondents to hold a

pre-deprivation evidentiary hearing before a *Section 4.3* suspension is implemented because the Respondents make provision for a post-deprivation hearing in the same *Section 4.3*. Id. at 136-137. Third, Respondents are delegated, assigned, or granted powers by the Tennessee Supreme Court via its Rule 9 which bureaucratic deliberation gravitates against the random, unauthorized deprivation of constitutionally protected interests that would justify the government being relieved of any pre-deprivation evidentiary hearing. Id. at 138, 115, 129-130 citing Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L.Ed.2d 420 (1981), Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984). Therefore, *Section 4.3* violates the Fourteenth Amendment to the U.S. Constitution because the general principles of due process dictate pre-determination due process, as opposed to post-determination due process, by the state-court agency herein. Zinermon, 494 U.S. at 136-39, 110 S. Ct. at 989-90, 108 L.Ed.2d at 120-22; *compare* T.C.A. 4-5-102(2), T.C.A. 4-5-320(c), T.C.A. 8-23-204(a)(1)(C), T.C.A. 8-23-207 *with* Mistretta v. United States, 488 U.S. 361, 384-385, 388-389, 393-394, 394 ftnt. 20, 109 S.Ct. 647, 661, 663-664, 665-666, 666 ftnt. 20, 102 L.Ed.2d 714, 738-39, 740-41, 743-44, 744 ftnt. 20 (1989)(holding that a federal-court agency is subject to the due process standards of the federal Administrative Procedure Act).[7]

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[7] *Section 4.3* of Rule 9 of the Tennessee Supreme Court is unconstitutional pursuant also to the state due process standards of Tennessee, TENN. CONST., Art. I, Sec. 8, because said disciplinary rule permits the state high court to (1) prescribe any notice to a Tennessee lawyer that it sees fit and (2) impose summary suspension on the professional license of a Tennessee lawyer, without the specific pre-deprivation findings and other

CONCLUSION

Based on the arguments above, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

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specified due process required by the Tennessee Administrative Procedures Act (TAPA), to wit:

> If the agency finds that public health, safety, or welfare *imperatively requires* emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action.

T.C.A. 4-5-320(c)[emphasis added]. Despite the unlawful efforts of the Tennessee Supreme Court to exempt itself from the due process provisions of the United States Constitution and the Tennessee Constitution via its various summary suspensionand sanctions powers, *Section 4.3 of Rule 9 of the Tennessee Supreme Court, Section 8.1 of Rule 9 of the Tennessee Supreme Court, Section 7.07 of Rule 21 of the Tennessee Supreme Court*, such state administrative procedures statute applies nevertheless to respondent Board of Professional Responsibility of the Tennessee Supreme Court because said board is a T.C.A. 8-23-207 and T.C.A. 8-23-204(a)(1)(C) "state agency" subject to TAPA, per T.C.A. 4-5-102(2). Therefore, such state-court agency is not itself a "court" exempt from the administrative due process provisions of TAPA, per T.C.A. 4-5-106(a). See Mistretta v. United States, 488 U.S. 361, 384-385, 388-389, 393-394, 394 ftnt. 20, 109 S.Ct. 647, 661, 663-664, 665-666, 666 ftnt. 20, 102 L.Ed.2d 714, 738-39, 740-41, 743-44, 744 ftnt. 20 (1989)(holding that a federal-court agency - despite its presence under the judicial branch - is not a court and does not exercise judicial power because it is an independent agency subject to the due process dictates of the federal Administrative Procedure Act); see also State v. Thompson, 197 S.W.3d 685, 691 (Tenn. 2006)(holding that the phrase "state agency" was operative to invoke TAPA provisions in that case).

Respectfully Submitted,

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Pro Se

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-6075

[Filed May 18, 2009]

DAVID E. DANNER,

Plaintiff-Appellant,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE TENNESSEE SUPREME COURT; CHARLES A. HIGH,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Before: GUY, GILMAN, and COOK, Circuit Judges.

COOK, Circuit Judge. David Danner sued the Tennessee Supreme Court's Board of Professional

Responsibility ("the Board") and its former Disciplinary Counsel, Charles High, during a Board investigation of complaints filed by Danner's former clients. The district court dismissed his case without prejudice under the abstention doctrine articulated in *Younger v. Harris*, 401 U.S. 37 (1971). Danner appeals, and we affirm.

I.

We review de novo a district court's order declining federal jurisdiction on grounds of *Younger* abstention, *Fieger v. Thomas*, 74 F.3d 740, 743 (6th Cir. 1996). The *Younger* doctrine counsels federal courts to abstain from enjoining certain pending state court criminal proceedings, 401 U.S. at 44, but the doctrine also extends to ongoing administrative proceedings, such as state bar disciplinary processes, *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434-35 (1982). Federal courts properly invoke *Younger* abstention when a proceeding satisfies three criteria: "(1) the underlying proceedings constitute an ongoing state judicial proceeding; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity to raise constitutional challenges in the course of the underlying proceeding." *Danner v. Bd. of Prof'l Responsibility of the Tenn. Supreme Court*, 277 F. App'x 575, 578 (6th Cir. 2008).

Here the Board proceedings are ongoing state judicial proceedings for purposes of applying *Younger*. The Board commenced its disciplinary process by authorizing a Petition for Discipline before Danner filed his state court claim. State bar disciplinary proceedings may be "judicial in nature." *Middlesex*, 457 U.S. at 433-34. In fact, this Circuit holds that

similar attorney disciplinary proceedings are "an adjudicative, rather than a legislative, function." *Squire v. Coughlan*, 469 F.3d 551, 556 (6th Cir. 2006); *see also Danner*, 277 F. App'x at 578; *Fieger*, 74 F.3d at 744.

As for the remaining *Younger* criteria, the regulation and discipline of attorneys is without a doubt an important state function. *See Danner*, 277 F. App'x at 579. Moreover, the disciplinary process provides for judicial review of allegations that the Board's findings violate constitutional provisions. *Id.* We therefore conclude that the proceedings satisfy all three of the *Younger* criteria and hold that the district court correctly abstained in deference to the state proceeding. In addition, Danner failed to invoke any of the exceptions to *Younger* abstention—"bad faith, harassment, or flagrant unconstitutionality." *Squire*, 469 F.3d at 556 (citation and internal quotation marks omitted).

II.

We affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

No. 3:08-0651
Judge Nixon

[Filed August 7, 2008]

DAVID E. DANNER, ESQ.,	)
	)
Plaintiff,	)
	)
v.	)
	)
BOARD OF PROFESSIONAL RESPONSIBILITY OF THE TENNESSEE SUPREME COURT; CHARLES A. HIGH,	)
	)
Defendants.	)
	)

ORDER

On July 31, 2008, the Court held a hearing on Plaintiff's Emergency Motion for Temporary Restraining Order ("Plaintiff's Motion") (Doc. No. 5). As a result of arguments presented at the hearing on Plaintiff's Motion, and after thorough review of the parties' pleadings, the Court determines that this case

should be **DISMISSED without prejudice** in accordance with Younger v. Harris, 401 U.S. 37 (1971). Plaintiff's Motion is **DENIED as moot.**

I. BACKGROUND

1. Procedural Background

Plaintiff David E. Danner, Esq. ("Mr. Danner") filed suit on June 27, 2008. (Doc. No. 1). Mr. Danner represents himself in this matter and claims violations of 42 U.S.C. §§ 1983 and 1985, the First, Fifth, and Fourteenth Amendments to the United States Constitution, and §§ 8, 19, and 21 of Article I of the Tennessee state Constitution. (Id.) He seeks a declaratory judgment that § 4.3 of Rule 9 of the Tennessee Supreme Court ("§ 4.3") is unconstitutional, an injunction against "any policy, practice, or conduct by Defendants deemed to be in violation of the federal and state constitutions," and an award of attorneys fees and costs. (Id.).

Mr. Danner filed the present Emergency Motion for Temporary Restraining Order (Doc. No. 5) on July 22, 2008. He filed a supporting Declaration of David E. Danner, Esq. (Doc. No. 6) on July 22, 2008, and a supporting Memorandum (Doc. No. 7) on July 23, 2008. Defendants filed a Response in Opposition (Doc. No. 8) along with a supporting Affidavit from Randall J. Spivey, Disciplinary Counsel for the Board of Professional Responsibility of the Supreme Court of Tennessee ("the Board"), (Doc No. 9) on July 23, 2008.

Plaintiff's Motion seeks a preliminary injunction against use of § 4.3 against any lawyer licensed to practice in Tennessee, or in the alternative, against

Plaintiff. Section 4.3 authorizes the Board to temporarily suspend the law license of a Tennessee-licensed attorney for failure "to respond to the Board of Disciplinary Counsel concerning a complaint of misconduct." TN. R. S. CT. RULE 9, § 4.3 (2008).

2. Factual Background[1]

1. Mr. Danner's Previous Suit Against the Board

On April 26, 2006, Mr. Danner filed a suit against the Board and its Disciplinary Counsel in the Middle District of Tennessee federal court that was, in all material respects, identical to the present suit. That earlier suit was filed in response to a notice of intention to discipline as well as a proposed admonition sent to Mr. Danner by the Board in March, 2006. This notice by the Board was the result of a complaint filed by a former client of Mr. Danner's in February, 2005. In notifying Mr. Danner of its intention to discipline, the Board acted under authority of § 8.1 of Rule 9 of the Tennessee Supreme Court Rules ("§ 8.1"). The basis of Mr. Danner's suit were claims that § 8.1 was unlawful under federal and state constitutions, and that the Board was engaging in retaliatory harassment of Mr. Danner responsive to his engagement in protected speech. The district court

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[1] All facts are undisputed unless otherwise noted. Facts in this section are taken from the Sixth Circuit's opinion in Danner v. Board of Professional Responsibility of the Tennessee Supreme Court, 2008 WL 1987043 (6th Cir. 2008). and the Affidavit of Randall J. Spivey (Doc. No. 9). Plaintiff's allegations are taken from the Declararation of David E. Danner (Doc. No. 6).

dismissed Mr. Danner's suit without prejudice under Younger. Mr. Danner's two subsequent pleas for post-judgment relief were denied, as was his appeal to the Sixth Circuit. Danner v. Bd. of Prof'l Responsibility, 2008 WL 1987043 (6th Cir. 2008).

The present suit arises out of slightly different facts. Two more complaints were filed against Mr. Danner by former clients of his in May, 2007. The Board responded to these complaints by mailing inquiries to Mr. Danner, asking him to justify his conduct and billing practices. The Board avers that it misplaced a few of Mr. Danner's responses to its inquiries, and erroneously issued a Notice of Petition for Temporary Suspension as a result. Mr. Danner timely responded to this Notice, and no action was taken to suspend his law license. It is undisputed that no proceeding is currently ongoing or contemplated for suspension of Mr. Danner's license.

The Notice mailed to Mr. Danner in error was issued under authority of § 4.3. Mr. Danner responded by filing the present suit. The factual differences between this action and the one filed in this District in 2006 are (1) that they arise out of different complaints registered with the Board, and (2) that they challenge different provisions of Rule 9 of the Tennessee Supreme Court Rules. reflective of the different disciplinary actions taken by the Board in the two instances. Mr. Danner maintains his claim of unlawful retaliation in violation of the First Amendment.

2. *The Board's Ongoing Proceedings Against Mr. Danner*

The Board did not take any disciplinary action against Mr. Danner relative to the 2007 complaints while Mr. Danner's earlier suit was pending in the Sixth Circuit. However, proceedings against Mr. Danner were not closed with regard to those complaints. Since the appellate decision came down in the Board's favor, the Board filed a Petition for Discipline against Mr. Danner on July 21, 2008.

II. LEGAL STANDARD

Younger held that a federal court should abstain from enjoining certain pending criminal proceedings in state courts. 401 U.S. at 44. The Younger abstention doctrine has been extended to apply to ongoing state civil, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and administrative, Middlesex County Ethics Commission v. Garden State Bar Association, 457 U.S. 421 (1982), proceedings. So extended, Younger requires federal court abstention when three (3) conditions are met: (1) the underlying proceedings constitute an ongoing state judicial proceeding; (2) which proceedings involve important state interests; and (3) the underlying proceeding provides adequate opportunity to raise constitutional challenges. Danner, 2008 WL 1987043 at *2; Loch v. Watkins, 337 F.3d 574, 578 (6th Cir. 2003). If these three criteria are met, the burden lies with the plaintiff to prove a Younger exception, "such as bad faith, harassment, or flagrant unconstitutionality." Danner, 2008 WL 1987043 at *2 (quoting Fieger v. Thomas, 74 F.3d 740, 750 (6th Cir. 1996)).

III. ANALYSIS

The Sixth Circuit's decision in Danner controls the Court's decision in this action.[2] In that case, the appellate court found: (1) that disciplinary proceedings by the Board constitute judicial proceedings (2) that implicate important state interests, and (3) that in the course of Board disciplinary proceedings and subsequent review, attorneys such as Mr. Danner have adequate opportunity to raise constitutional challenges. 2008 WL 1987043 at *3-4.

The only question which Danner does not answer with regard to this proceeding is whether there is an ongoing proceeding by the Board against Mr. Danner. The Court finds that there is. A state proceeding is "ongoing" for purposes of Younger when it predates the plaintiff's federal court filing. Danner, 2008 WL 1987043 at *3. In the present case, proceedings against Mr. Danner relative to complaints filed against him in 2007 were not resolved at the time of filing in this case. The Board withheld disciplinary action against Mr. Danner while his earlier appeal was pending in the Sixth Circuit, and has since issued a Petition for Discipline against Mr. Danner that remains pending.

None of the Younger exceptions have been plead or proven in this case.

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[2] There was argument at the July 31, 2008 hearing on Plaintiff's motion regarding whether or not the Board is immune from suit under the Eleventh Amendment. Plaintiff has subsequently submitted briefing on this issue. See (Doc. No. 13). For the reasons discussed below, the Court determines it unnecessary to reach this issue.

Mr. Danner argued orally at the hearing on Plaintiff's Motion that Younger ought not apply in this case because, on the facts, Mr. Danner's suit is an exception to the Rooker-Feldman doctrine. The Rooker-Feldman doctrine prohibits parties from appealing adverse state court decisions in federal district courts. D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). Rooker-Feldman and Younger are distinct doctrines; that one may not apply in a given case has no necessary bearing on the applicability of the other. Mr. Danner made the same Rooker-Feldman argument in his previous suit against the Board, and the Sixth Circuit found it to be without merit. Danner, 2008 WL 1987043 at *5. As a result, Plaintiff presents no valid reason that Younger should not apply in this case.

IV. CONCLUSION

For the foregoing reasons, the Court **DISMISSES without prejudice** Plaintiff's Complaint under the abstention doctrine of Younger v. Harris. Accordingly, Plaintiff's Emergency Motion for Temporary Restraining Order is **DENIED** as moot

It is so ORDERED.

Entered this 9th day of August, 2008.

/s/
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-6075

[Filed July 29, 2009]

DAVID E. DANNER,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
BOARD OF PROFESSIONAL RESPONSIBILITY OF THE TENNESSEE SUPREME COURT, ET AL.	)
	)
Defendants-Appellees.	)

ORDER

BEFORE: GUY, GILMAN, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

Case No. 3:08-0651

[Filed July 31, 2008]

DAVID E. DANNER, ESQ.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
BOARD OF PROFESSIONAL RESPONSIBILITY OF THE TENNESSEE SUPREME COURT, CHARLES A. HIGH,	)
	)
Defendants.	)
	)

PLAINTIFF'S POST-HEARING BRIEF

Comes now the plaintiff, David E. Danner, Esq., and submits his post-hearing brief concerning the oral argument of Defendants at the Rule 65 hearing held

on July 31, 2008 which included an Eleventh Amendment analysis (Answer ¶5, aff.def.).[1]

The Sixth Circuit's Eleventh Amendment analysis considers the *primary* issue of determining whether an entity is a state department or agency for the purpose of immunity as whether the state would ultimately be liable for any money judgment. Dubuc v. Michigan Bd. of Law Examiners, 342 F.3d 610, 615 (6th Cir. 2003) ("To determine whether an entity is a state department or agency for purpose of the Eleventh Amendment, the primary issue is whether the state would ultimately be liable for any money judgment against the entity") citing Brotherton v. Cleveland, 173 F.3d 552, 560-61 (6th Cir. 1999). Therefore, defendant state agency can be sued in federal court,[2] to wit:

> Defendant Board of Professional Responsibility of the Tennessee Supreme Court is a board created by the Tennessee Supreme Court and is thus an agency of the State of Tennessee

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[1] Plaintiff requested in open court that Defendants be ordered to provide a written response to Plaintiff's pre-hearing brief (DE#12).

[2] Pursuant to 28 U.S.C. § 1367 (Complaint ¶3), defendant state agency can be sued in federal court for supplemental state claims because a state agency is a person, pursuant to T.C.A. 4-5-102(9), for the purpose of Plaintiff's claims under the Tennessee Constitution (Complaint ¶22). Tennessee courts have not seen fit to protect state citizens by establishing any cause of action for monetary damages for any violation of the Tennessee constitution by state officials. Lee v. Ladd, 834 S.W.2d 323, 324 (Tenn. Ct. App. 1992); Cline v. Rogers, 87 F.3d 176, 179 (6th Cir. 1996). However, Tennessee courts have provided some equitable relief in some constitutional matters. E.g. Doe v. Norris, 751 S.W.2d 834, 840, 842 (Tenn. 1988).

> employing persons who are employees of the State of Tennessee, pursuant to T.C.A. 8-23-207. Per *Preamble ¶ 10, Rule 8 of the Tennessee Supreme Court* and *Section 20, Rule 9 of the Tennessee Supreme Court*, the regulations of defendant board state that (A) it is "largely self-governing" and that (B) it is self-financed by annual taxes on Tennessee lawyers. Defendant Board can be sued in federal district court. Defendant Board is administratively and financially autonomous from the State of Tennessee to a degree that a judgment against it would not touch the Tennessee state treasury. Defendant board possesses no immunity from suit in federal court via the Eleventh Amendment to the U.S. Constitution. (Complaint ¶6; *see also* Answer ¶6).

Per *Preamble ¶ 10, Rule 8 of the Tennessee Supreme Court* and *Section 20, Rule 9 of the Tennessee Supreme Court*, the regulations of defendant board state that (A) it is "largely self-governing" and that (B) it is <u>self-financed</u> by annual taxes on Tennessee lawyers. This is Tennessee state law. *Section 20, Rule 9 of the Tennessee Supreme Court.*

The Dubuc panel of the Sixth Circuit found that the parties to that case had submitted <u>*no evidence*</u> regarding whether the State of Michigan would have been ultimately responsible for any money judgment against the Board or the Bar in that case and thus a determination was made in favor of Eleventh Amendment immunity on other *secondary* factors, 342 F.3d at 615 (citing the *Brotherton* court as "declining to decide whether these other factors are relevant to the inquiry"), whereas a later Sixth Circuit panel

found, citing *Dubuc*, that same said Board and Bar were immune because they merely were arms of the state of Michigan without said panel delving into any state-treasury fact question. Lawrence v. Chabot, 182 Fed.Appx. 442, 450 (6th Cir. 2006). Based on the "primary" analysis of the *Dubuc* panel, the state-agency defendant herein can be sued in federal court consistent with both its *evidentiary admissions - Section 20, Rule 9 of the Tennessee Supreme Court* - and the Eleventh Amendment, *cf* 342 F.3d at 615, thereby serving to distinguish this Tennessee-state-agency case from both the *Chabot* ruling, 182 Fed.Appx. at 450, and the *Dubuc* ruling specifically on the Michigan state agency. 342 F.3d at 615.

Conclusion

Based on the above-stated reasons, the Court should grant a temporary restraining order and/or preliminary injunction to Plaintiff lawyer to enjoin Defendants' general, prospective operation of *Section 4.3* against any Tennessee lawyer.

Respectfully submitted:

/s/ David Danner
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* * *

[Certificate of Service Omitted in Printing of this Appendix]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

Case No. 3:08-0651

[Filed July 29, 2008]

DAVID E. DANNER, ESQ.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
BOARD OF PROFESSIONAL RESPONSIBILITY OF THE TENNESSEE SUPREME COURT, CHARLES A. HIGH,	)
	)
Defendants.	)
	)

PLAINTIFF'S PRE-HEARING BRIEF

Comes now the plaintiff, David E. Danner, Esq., and, submits his pre-hearing brief concerning the Rule 65 hearing set for July 31, 2008.

Section 4.3 is unconstitutional because said state-court rule is impermissibly vague on its face under the overbreadth doctrine by failing to establish standards that are sufficient to guard against the arbitrary deprivation of constitutional rights. City of Chicago v. Morales, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); see also Norfolk 302, LLC v. Vassar, 524 F.Supp.2d 728, 739-40 (E.D. Va. 2007). *Section 4.3* permits a property right – a law license - to be deprived without a predetermination hearing, *Zinermon v. Burch*, 494 U.S. 113, 136-39, 110 S. Ct. 975, 108 L.Ed.2d 100, 120-22 (1990), and it provides no protection to Tennessee lawyers against Defendants engaging in countless repetitive inquiries to a lawyer by using the specter of a *Section 4.3* non-response penalty despite a lawyer's prior response(s) (Complaint ¶¶13, 14; DE#9, Affid. of Spivey ¶7; Danner Dec. ¶5), to wit:

> On petition of the Disciplinary Counsel and supported by an affidavit demonstrating facts personally known to affiant, showing that an attorney has misappropriated funds to the attorney's own use, has failed to respond to the Board or Disciplinary Counsel concerning a complaint of misconduct, has failed to substantially comply with a contract entered into with the Tennessee Lawyer Assistance Program, or otherwise poses a threat of substantial harm to the public, the Supreme Court may issue an order *with such notice as the Court may prescribe* imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both. ... (emphasis added)

Section 4.3 of *Rule 9 of the Tennessee Supreme Court*. Such cursory notice stated in the rules as "with such notice as the Court may prescribe" is unconstitutionally vague due process. Norfolk 302, 524 F.Supp.2d at 739-40 (E.D. Va. 2007).

Therefore, *Section 4.3* fails to comply with both the state law and the federal law of due process, *infra*.

Due Process – State Law

Section 4.3 of *Rule 9 of the Tennessee Supreme Court* is unconstitutional pursuant to state-standard due process because said rule permits summary suspension of the law license of a Tennessee lawyer without the predetermination hearing required by the Tennessee Administrative Procedures Act (TAPA), T.C.A. 4-5-320(d)(1), which state statute applies to the Board of Professional Responsibility of the Tennessee Supreme Court because said board is a T.C.A. 8-23-207 "state agency" subject to TAPA, per T.C.A. 4-5-102(2), and thus said board is not a "court" exempt from TAPA, per T.C.A. 4-5-106(a).

First, the Tennessee General Assembly has defined the Board of Professional Responsibility of the Tennessee Supreme Court as a "state agency" (Complaint ¶6; Answer ¶6), to wit:

> [A]ny self-sustaining board, commission or agency created by the supreme court of Tennessee shall be deemed a *state agency* and all employees of such boards, commissions or agencies shall be deemed state employees and shall be entitled to the same rights and benefits

> enjoyed by other state employees. (emphasis added)

T.C.A. 8-23-207. Said code chapter defines "state agency" as "any department, commission, board, office or other agency of the executive, legislative or *judicial branch* of state government (emphasis added)." T.C.A. 8-23-204(a)(1)(C). See State v. Thompson, 197 S.W.3d 685, 691 (Tenn. 2006)(holding that the phrase "state agency" was operative to invoke TAPA provisions in that case). Also, TAPA defines "agency" as "each state board, commission, committee, department, officer, or any other unit of state government authorized or required by any statute or *constitutional provision* to *make rules* or to determine contested cases (emphases added)." T.C.A. 4-5-102(2). Moreover, the Board *makes rules* pursuant to the inherent *constitutional* power of the Tennessee Supreme Court. T.C.A. 4-5-102(2); *Section 5.5(f) of Rule 9 of the Tennessee Supreme Court*, infra ("To adopt rules of procedure not inconsistent with these rules [Rules 9]"); Belmont v. Board of Law Examiners, 511 S.W.2d 461, 462 (Tenn. 1974)(holding that the state supreme court possesses the inherent power to prescribe and administer rules pertaining to the licensing and admission of attorneys). Furthermore, Tennessee rules of statutory construction permit plain-language phrases such as "state agency" and/or "agency" to be defined and reconciled between different sections of a legislative code, *Loftin v. Langdon*, 813 S.W.2d 475, 487 (Tenn. Ct. App. 1991), *In re Lucas*, 924 F.2d 597, 601 (6th Cir. 1991)(holding that a phrase in the bankruptcy-code portion of the federal code can be defined by the ERISA portion of said code), to wit:

> [I]t would be incongruous to give different constructions to an identical phrase at various sections of the code ... 924 F.2d at 601.

Second, TAPA excludes "courts" from its provisions, T.C.A. 4-5-106(a), and the Tennessee constitution creates one supreme "court" and authorizes other inferior "courts" as the Tennessee *Legislature* – not the Tennessee Supreme *Court* - may Establish. TENN. CONST. Art. VI, Sec. 1. Also, the state constitutional definition of "court" includes the adjudication of rights between adversaries by a judge(s), to wit:

> A court is an instrumentality of sovereignty, the repository of its judicial power, with authority to *adjudge* as to the *rights* of person or property between adversaries. *The presence of a judge or judges is necessary as an essential element of a court*. (emphases added)

Mengel Box Co. v. Fowlkes, 186 S.W. 91, 92 (Tenn. 1916). Moreover, the creation of the Board of Professional Responsibility *by* the Tennessee Supreme Court - even if said state constitutional supreme court were permitted to create a lower court by the Tennessee Constitution - included no authority for the Board to adjudicate *rights* between adversaries *by judges*,[1] *Fowlkes* supra, to wit:

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[1] Board decisions are not judge decisions. See Mengel Box Co. v. Fowlkes, 186 S.W. 91, 92 (Tenn. 1916). Tennessee state judges are not *elected* to the Board of Professional Responsibility of the Tennessee Supreme Court by the "qualified voters" of the state or of a district of the state as would be required by the Tennessee Constitution (Complaint ¶10). TENN. CONST. Art. VI, Sec. 3, Sec. 4. The Tennessee Supreme Court actually *appoints* persons to

The Board shall exercise the powers and perform the duties conferred and imposed upon it by these disciplinary rules, including the power and duty:

(a) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, and upon its own motion, and to take such action with respect thereto as shall be appropriate to effectuate the purposes of these disciplinary rules.

(b) To adopt written guidelines to ensure the efficient and timely resolution of complaints, investigations, and formal proceedings, which guidelines shall be approved by the Court, and to monitor Disciplinary Counsel's and the hearing panels' continuing compliance with those guidelines ...

(c) To assign members of the district committees appointed within each disciplinary district to conduct disciplinary hearings and to review and approve or modify recommendations by Disciplinary Counsel for dismissals or informal admonitions.

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serve on the twelve-member Board, pursuant to *Section 5.1* of *Rule 9 of the Tennessee Supreme Court*.

> **(d) To review, upon application by Disciplinary Counsel, a determination by the reviewing member of a district committee that a matter should be concluded by dismissal or by private informal admonition without the institution of formal charges.**
>
> **(e) To privately reprimand attorneys for misconduct.**
>
> **(f) To adopt rules of procedure not inconsistent with these rules.**
>
> **(g) The Board shall, to the extent it deems feasible, consult with officers of local bar associations concerning any appointment it is authorized to make under these rules.**

Section 5.5 of *Rule 9 of the Tennessee Supreme Court*. Furthermore, the Tennessee Supreme Court possesses the exclusive separation-of-powers authority to issue a Tennessee law license per the *state* constitution. Belmont, 511 S.W.2d at 464. But, once so *issued*, the Tennessee Supreme Court possesses no *carte blanche* to summarily take a Tennessee law license from a Tennessee lawyer which constitutes a property right to the Tennessee lawyer per the *federal* constitution. See e.g. In re Ming, 469 F.2d 1352, 1355 (7th Cir. 1972).

Therefore, the Board is subject to TAPA because the Board is *not* a state constitutional "court" pursuant to T.C.A. 4-5-106(a) adjudicating, by voter-elected

judges,[2] any rights or controversies between adversarial individuals per *Fowlkes*, *Section 5.5*, and TENN. CONST. Art. VI, Sec. 3, Sec. 4 supra - whereas the Board is a "state agency" that makes rules per the inherent constitutional authority of the state supreme court pursuant to T.C.A. 4-5-102(2), *Belmont*, and *Section 5.5(f)* supra - because the Tennessee Supreme Court possesses no state constitutional authority to create any inferior "court" in lieu of the Tennessee Legislature pursuant to the Tennessee Constitution. TENN. CONST. Art. VI, Sec. 1. Thus, *Section 4.3* of *Rule 9 of the Tennessee Supreme Court* is a vague, impermissible administrative substitute for the Board's compulsory constitutional compliance with the state predetermination or pre-deprivation due process requirements of T.C.A. 4-5-320(d)(1), including the evidentiary-hearing finding prior to even a summary suspension per T.C.A. 4-5-320(c)("If the agency *finds* that public health, safety, or welfare *imperatively* requires emergency action, and incorporates a *finding* to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. [emphases added]").[3] T.C.A.

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[2] TENN. CONST. Art. VI, Sec. 3, Sec. 4.

[3] Despite Defendants' sending Plaintiff a 10-day notice prior to *summary suspension* per *Section 4.3* in order to respond to a disciplinary complaint – which Plaintiff had already responded to – response (DE#9, Affid. of Spivey ¶7) such notice did not comply with T.C.A. 4-5-320(c)("No revocation, suspension, or withdrawal of any license is lawful unless, prior to the *institution* of *agency proceedings*, the agency gave notice by mail to the licensee of facts or conduct that warrant the intended action, and the licensee was given an opportunity to show compliance with all *lawful requirements* for the retention of the license." [emphases added]) because (1) Defendants failed to comply with T.C.A. 4-5-320(d)(1),

4-5-320(d)(2); see also Norfolk 302, LLC v. Vassar, 524 F.Supp.2d 728, 739-40 (E.D. Va. 2007).

Due Process – Federal Law

Section 4.3 of *Rule 9 of the Tennessee Supreme Court* is unconstitutional pursuant to federal-standard due process because said rule permits summary suspension of the law license of a Tennessee lawyer without the predetermination hearing required by the procedural due process clause of the Fourteenth Amendment to the United States Constitution, to wit:

> On petition of the Disciplinary Counsel and supported by an affidavit demonstrating facts personally known to affiant, showing that an attorney has misappropriated funds to the attorney's own use, has failed to respond to the Board or Disciplinary Counsel concerning a complaint of misconduct, has failed to substantially comply with a contract entered into with the Tennessee Lawyer Assistance Program, or otherwise poses a threat of substantial harm to the public, the Supreme Court may issue an order with such notice as the Court may prescribe imposing temporary conditions of probation on said attorney or

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which references said subsection (c), (2) Defendants' 10-day notice would have preceded a *summary suspension* per fiat, rather than the notice being an "institution" or commencement of *agency proceedings* per process, such as a predetermination hearing per T.C.A. 4-5-320(d)(1), and (3) Defendants were not engaged in *lawful* activity by allegedly using the 10-day notice to unlawfully threaten Plaintiff (Complaint ¶13).

temporarily suspending said attorney, or both. ... (emphasis added)

Section 4.3, Rule 9 of the Tennessee Supreme Court. Due process is a flexible concept that avoids a fixed content unrelated to time, place and circumstance and that calls for such procedural protections as the *particular situation* demands. Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L.Ed.2d 18, 33 (1976) quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L.Ed.2d 1230 (1961), Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). The specific dictate of due process cases "generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews, 424 U.S. at 335 citing Goldberg v. Kelly, 397 U.S. 254, 263-271, 90 S. Ct. 1011, 25 L.Ed2d 287 (1970). 7

In the "particular situation" herein, procedural due process specifically requires an evidentiary hearing *before* summary suspension of law licensure is implemented pursuant to *Section 4.3*. Zinermon v. Burch, 494 U.S. 113, 136-39, 110 S. Ct. 975, 108 L.Ed.2d 100, 120-22 (1990). First, it is not unforeseeable that a Tennessee lawyer could be suspended under said rule. Id. at 136. Second, it is not impossible for the Board to hold a pre-deprivation evidentiary hearing before *Section 4.3* suspension is

implemented because the Board makes provision for a post-deprivation hearing in the same *Section 4.3.*[4] Id. at 136-137. Third, Defendants are delegated, assigned, or granted power by the state high court via *Rule 9* which gravitates against the random, unauthorized deprivation of constitutionally protected interests that would justify the government being relieved of any predetermination evidentiary hearing. Id. at 138, 115,

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[4] It is a curious phenomenon concerning equal protection analysis that a Tennessee lawyer can be suspended by a *Section 4.3* petition filed by Disciplinary Counsel without prior service of a copy of such petition on the lawyer but a Tennessee lawyer must serve on the prosecuting Disciplinary Counsel a request for dissolution or amendment of said suspension, and the lawyer must also have "good cause" for the request, to wit:

> On petition of the Disciplinary Counsel and supported by an affidavit demonstrating facts personally known to affiant, showing that an attorney has misappropriated funds to the attorney's own use, has failed to respond to the Board or Disciplinary Counsel concerning a complaint of misconduct, has failed to substantially comply with a contract entered into with the Tennessee Lawyer Assistance Program, or otherwise poses a threat of substantial harm to the public, the Supreme Court may issue an order with such notice as the Court may prescribe imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both. ...
>
> The attorney may for good cause request dissolution or amendment of any such temporary order by petition filed with the [Tennessee] Supreme Court, a copy of which will be served on the Disciplinary counsel. Such petition for dissolution shall be set for immediate hearing before the Board of Professional Responsibility ...
>
> *Section 4.3, Rule 9 of the Tennessee Supreme Court.*

129-130 citing Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L.Ed.2d 420 (1981), Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984). Therefore, *Section 4.3* violates the Fourteenth Amendment to the U.S. Constitution because the general principles of due process dictate predetermination-hearing due process herein. Zinermon, 494 U.S. at 136-39.

Conclusion

Based on the above-stated reasons, the Court should grant a temporary restraining order and/or preliminary injunction to Plaintiff lawyer to enjoin Defendants' general, prospective operation of *Section 4.3* against any Tennessee lawyer.

Respectfully submitted:

/s/ David Danner
David E. Danner, Esq.
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* * *

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

Case No. 3:08-0651

[Filed July 22, 2008]

DAVID E. DANNER, ESQ.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
BOARD OF PROFESSIONAL RESPONSIBILITY OF THE TENNESSEE SUPREME COURT, CHARLES A. HIGH,	)
	)
Defendants.	)
	)

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Comes now the plaintiff, David E. Danner, Esq., and, pursuant to FRCP 65(b), moves the court for a temporary restraining order for ten (10) days and a preliminary injunction until trial - for expedited

consideration - with any reasonable bond set by the Court per FRCP 65(c); due to the impending, imminent, retaliatory operation of *Section 4.3* of *Rule 9 of the Tennessee Supreme Court* or other regulation to unlawfully, unilaterally, and/or summarily suspend Plaintiff lawyer's license to practice law without a pre-deprivation hearing being afforded to movant Tennessee lawyer by the State - despite Plaintiff lawyer's multiple responses to ethics inquiries - via pretext of disciplinary action against a Tennessee lawyer.

For grounds, such retaliation for Plaintiff's exercise of free speech against the Tennessee Plan and/or prior grievances or access to courts would violate the First Amendment to the U.S. Constitution.

Movant requests that the Court issue a preliminary injunction to:

(1) enjoin immediately the Defendants' operation of *Section 4.3* of *Rule 9 of the Tennessee Supreme Court* against any Tennessee lawyer during the pendency of this case;

(2) enjoin immediately the Tennessee Supreme Court or Defendants from any suspension of any law licensure pursuant to *Section 4.3* of *Rule 9 of the Tennessee Supreme Court*; and/or

(3) enjoin immediately any imminent action or proceeding of Defendants deemed to be retaliatory against Plaintiff.

Respectfully submitted:

/s/ David Danner
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* * *

[Certificate of Service Omitted in Printing of this Appendix]